

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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PAULINO ESPINOBARROS (A.K.A
PABLO),

Docket No.: **17-cv-5587 (KPF)**

Plaintiff,

-against-

FIRST & FIRST FINEST DELI CORP. (d/b/a
FIRST & FIRST FINEST DELI), FOOD U
DESIRE 3, CORP. (d/b/a FIRST AND FIRST
FINEST DELI), ADEEB GHANA, ABU
MUBAREZ, OTHMAN MUBAREZ, and
YOUNES MUBAREZ

Defendants.

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**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION IN LIMINE
TO PRECLUDE DISCUSSION OF UNREALTED CASE**

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Attorneys for Plaintiffs

Plaintiff Paulino Espinobarros, by his attorneys Michael Faillace & Associates, P.C., submit this memorandum of law in support of his motion *in limine* to preclude any discussion by Defendants' attorney or Defendants of this Court's decision in an unrelated action, *Marcellino v. 374 Food, Inc.*, Index No. 16-cv-6287 (KPF) ("the *Marcellino* Action").

In conference before the Court, and in conversation with Plaintiff's attorney about this case, Defendants' attorney has alluded repeatedly to this Court's decision in the *Marcellino* Action. The *Marcellino* Action was an FLSA action tried in a bench trial tried by attorneys from Plaintiff's attorneys' firm, but not the same attorney as will be trying this action. The *Marcellino* Action was tried before the same judge who will presiding over this jury trial. It involved parties who had no connection to any party in this action. In the *Marcellino* Action the Court found after a bench trial that the plaintiff was not credible (and found he committed perjury) concerning the duration of his employment for Defendants.

Because Defendants' attorney has alluded to the *Marcellino* Action repeatedly in the course of this litigation, Espinobarros is concerned that Defendants' attorney or Defendants will refer to the *Marcellino* Action at trial. Any such reference would be entirely inappropriate.

The *Marcellino* Action is not relevant in any way to this action, and any reference to it before the jury would be highly prejudicial. "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." F.R.E. 401. "Irrelevant evidence is not admissible. F.R.E. 402. Moreover, the Court may exclude even relevant evidence "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury . . ." F.R.E. 403.

This Court's findings in the *Marcellino* Action have no tendency to make a fact of any consequence in this action more or less probable. The only purpose Defendants or their attorney would have in alluding to the *Marcellino* Action in this action would be to suggest to the jury that just as the Court found the plaintiff in the *Marcellino* Action committed perjury concerning the dates he worked, so to the plaintiff in this case — another FLSA action brought by the same firm and before the same judge — will give false testimony about his duration of employment. Any such implication would be absurd, highly prejudicial, would potentially confuse and mislead the jury, and severely threaten Espinobarros's rights to a fair trial on his claims.

Accordingly, Espinobarros respectfully requests that the Court preclude Defendants or Defendants' attorney from alluding in any way to the *Marcellino* Action before the jury in this action.

CONCLUSION

Wherefore, it is respectfully requested that the Court preclude Defendants or Defendants' attorney from alluding in any way to the *Marcellino* Action before the jury in this action

Dated: New York, New York
June 25, 2018

MICHAEL FAILLACE & ASSOCIATES, P.C.
Attorneys for Plaintiff

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